



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: J.L. Associates, Inc.

File: B-236698.2

Date: January 17, 1990

DIGEST

Agency determination not to include Service Contract Act provisions in a contract for specialized education program is reasonable where the principal purpose of the contract is to procure professional services, which are exempt from the statute's coverage, notwithstanding the incidental use of service employees under the contract.

DECISION

J.L. Associates, Inc. (JLA), protests the National Aeronautics and Space Administration's (NASA) determination that the Service Contract Act is not applicable to request for proposals (RFP) No. W-10-47610/HWE, for the operation and management of the NASA Aerospace Education Services Program. We deny the protest.

The RFP contemplates the award of a cost-reimbursement type 1-year contract with 4 option years. The successful contractor under the solicitation is to provide the personnel, materials, and services required to satisfactorily perform the NASA Aerospace Education Services Program. This program involves educational visits to schools, courses and workshops for elementary and secondary school teachers, presentations for educational television and radio, presentations to civic clubs and professional organizations, and special services at science and technology centers, museums and planetaria. The staffing plan in the RFP called for 29 full-time aerospace education program specialists and a number of full-time and part-time administrative assistants (which amounted to the equivalent of 8.5 full-time positions) as well as a program director and an assistant program director.

JLA contends that the Service Contract Act, which requires federal contractors performing service contracts to pay

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minimum wages and fringe benefits determined by the Secretary of Labor, covers this procurement, and that the corresponding implementing provision of the Federal Acquisition Regulation (FAR) § 52.222-41 (FAC 84-46), should therefore have been included in the RFP. The protester alleges that NASA is attempting to evade the Act's provisions because it has classified all of the employees under the proposed contract as "professional" or "administrative," and therefore exempt from coverage. According to JLA, one of these classifications, "administrative assistant," is improper because the duties to be performed by these employees indicate that the job classification of "Secretary" would be more accurate. Secretaries are considered to be service employees and would generally be covered by the Act.

The Service Contract Act of 1965, 41 U.S.C. §§ 351-358 (1982), is applicable to contracts the "principal purpose" of which is to furnish services through the use of service employees. 41 U.S.C. § 351; FAR § 22.1001 (FAC 84-46). If, however, the contract's principal purpose is to provide something other than services of the character contemplated by the law, and such services which may be performed are only incidental to the performance of a contract for another purpose, the law does not apply. 29 C.F.R. § 4.111(a) (1989).

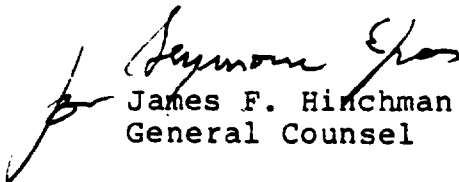
A "service employee" is defined as "any person engaged in the performance of a service contract other than any person employed in a bona fide executive, administrative or professional capacity, as those terms are defined in Part 541 of Title 29, Code of Federal Regulations." FAR § 22.1001.

The regulatory scheme implementing the law provides for an initial determination by the contracting agency as to whether the statute applies to a particular procurement. If the contracting officer believes that a proposed contract "may be subject to" the Service Contract Act, he is required to notify the Department of Labor of the agency's intent to make a service contract so that the Department of Labor can provide the appropriate wage determination. 29 C.F.R. § 4.4 (1989). Where, as here, the agency does not believe a contract may be subject to the law, then there is no duty on the part of the agency to notify the Department of Labor or to include Service Contract Act provisions in the solicitation. See Tenavision, Inc., B-231453, Aug. 4, 1988, 88-2 CPD ¶ 114. When a protester challenges an agency's decision that the law does not apply to a particular procurement, the determination to be made is whether the agency acted reasonably. Id.

In this case, we believe it was reasonable for the contracting officer to determine that this contract is primarily for professional services and, therefore, exempt from Service Contract Act requirements.

JLA does not dispute that the education specialists called for under the solicitation, representing approximately 80 percent of the work force, are properly classified as "professionals" and therefore exempt from the Services Contract Act. In our view, it is clear that the purpose of the contract is to implement a specialized education program and manage the program's activities, and that the contract is to be performed essentially by bona fide professionals. As the protester recognizes, the support personnel at issue were to perform essentially clerical tasks; they were not to provide the specialized education services being procured. In this regard, Department of Labor regulations indicate that the Service Contract Act covers service contracts only where "service employees" will be used in performing the services which it is the purpose of the contract to procure. See 29 C.F.R. § 4.113(a)(1), and that the Service Contract Act need not be applied to a contract of this type where the use of service employees is only a minor factor in the performance of the contract. See 29 C.F.R. § 4.113(a)(3). Thus, the issue of whether the support personnel required under the RFP are to be classified as "secretaries" or "administrative assistants" is irrelevant. Even if those jobs are not exempt from the law's coverage, the agency reasonably concluded that the contract is nonetheless exempt because its principal purpose is to provide professional services, which are exempt.

The protest is denied.


James F. Hinchman
General Counsel